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Ralph E. Jocke
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August 30, 2002

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Commissioner for Patents
Washington, D.C. 20231

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Attn: Art Unit 3653
Patent Examiner Michael E. Butler

Re: **Application Serial No.:** 09/384,650
Confirmation No.: 8099
Applicants: James A. Michael, et al.
Title: Method For Dispensing Medical Items
Docket No.: D-1079 DIV

Sir:

Please find enclosed Appellants' Response to the Office Action dated August 1, 2002 for filing in the above identified Application.

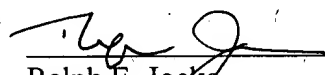
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Ralph E. Jocke

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rej@walkerandjocke.com
E-MAIL

231 South Broadway, Medina, Ohio U.S.A. 44256-2601



D-1079 DIV

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **James A. Michael, et al.**

Serial No.: **09/384,650**

Confirmation No.: **8099**

Filed: **August 27, 1999**

Title: **Method For Dispensing Medical Items**

Art Unit 3653

Patent Examiner:
Michael E. Butler

Box AF
Commissioner for Patents
Washington, D.C. 20231

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Sir:

Appellants received a miscellaneous Office communication from the examiner dated August 1, 2002. Appellants respectfully submit that the examiner has again committed a clear error with regard to examining procedure.

The communication refers to MPEP § 710.06. This section of the Manual relates to when an Office error is called to the attention of the Office after the expiration of the period for reply. The communication states that "The response period from the final rejection began 12/4/00 expiring 3/5/01. Applicant notified the office in his 4/24/01 response. Accordingly, no restart on the response period is permitted." The mentioned "4/24/01 response" apparently corresponds to Appellants' submitted appeal brief.

The assertions in the communication are without merit with regard to MPEP § 710.06. Appellants need no restart on a response period. Appellants' appeal brief was timely submitted. Furthermore, Mr. Gerald Goldberg, Director of Technology Center 3600, agrees that Appellants' appeal brief was timely submitted. The decision dated March 18, 2002 in granting Appellants' petition states that "On April 23, 2001, petitioner timely submitted an appeal brief."


The communication also included a copy of U.S. Patent 5,445,294 to Gardner, et al ("Gardner"). The communication further included a modified PTO-892 adding a citation to the Gardner reference. That is, in the communication the Gardner reference was cited for the first time.

The Gardner reference was previously not of record. The Gardner reference is newly cited. The rejections from which the appeal was taken simply referred to an alleged "Gardner '294" reference. Appellants had neither the patent number (if it was a U.S. patent) of the Gardner reference nor a copy of the Gardner reference. There was also a question as to whether the alleged Gardner '294 reference constituted prior art. Nor did it appear that the alleged Gardner '294 reference even existed. Appellants were denied information regarding the applied Gardner '294 reference.

The examiner is reminded that 37 CFR § 1.193(a)(2) clearly prohibits the entry of a new ground of rejection in an Examiner's Answer. A reference cited for the first time in an Examiner's Answer (such as the Gardner reference) will constitute a new ground of rejection. Additionally, in order to enter a new ground of rejection after Appellants' Brief has been filed, the examiner, with supervisory approval, must reopen prosecution. Particularly note MPEP § 1208.01 and 1208.02.

The examiner is hereby notified that in the decision dated March 18, 2002 the Director ordered that the application "be forwarded to the assigned examiner for prompt consideration of the brief and preparation of an examiner's answer." Appellants still await the "prompt" consideration and the Examiner's Answer. Appellants respectfully request that any other communication preceding the Examiner's Answer be first sent to the Director.

Respectfully submitted,



Ralph E. Jocke Reg. No. 31,029
WALKER & JOCKE
231 South Broadway
Medina, Ohio 44256
(330) 721-0000